

State of Wisconsin



Labor and Industry Review Commission

Tushumi N. Turner
Employee

Kimco Facility Services LLC
Employer

Hearing No. 24005897MD

**Unemployment Insurance
Decision¹**

Dated and Mailed:

October 31, 2024

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The commission **reverses** the appeal tribunal decision. Accordingly, the employee is eligible for benefits beginning in week 28 of 2024, if otherwise qualified.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

¹ **Appeal Rights:** See the blue enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the following as defendants in the summons and the complaint: the Labor and Industry Review Commission, all other parties in the caption of this decision or order (the boxed section above), and the Department of Workforce Development. Appeal rights and answers to frequently asked questions about appealing an unemployment insurance decision to circuit court are also available on the commission's website, <http://lirc.wisconsin.gov>.

Procedural Posture

This case is before the commission to consider the employee's eligibility for unemployment insurance benefits. An administrative law judge (ALJ) of the Unemployment Insurance Division of the Department of Workforce Development held a hearing and issued a decision. The commission received a timely petition for review. The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing. Based upon its review, the commission makes the following:

Findings of Fact and Conclusions of Law

The employee worked for the employer, a janitorial business, as a janitor from early March of 2023 until July 9, 2024 (week 28). The employer did not appear at the hearing.

During her employment with the employer, the employee completed floating assignments, ranging in length from a few months to over a year, to work at different retail stores. The employee had a different manager for each assignment.

In March of 2024, the employee wanted to move to San Antonio, Texas. The employee sought a transfer to an open position with the employer in San Antonio and made numerous transfer attempts via email and phone. In March of 2024, she initiated the transfer process by contacting her manager at her current assignment to request a transfer. Her manager did not respond. Later, the employee again requested a transfer from the employer. A different representative from the employer promised the employee that she would have a job when she moved to San Antonio and indicated that it was working on her transfer request. On May 28, 2024, the employee submitted a third transfer request to the employer, but she did not receive a response.

The employee last worked on July 9, 2024. Because she had already signed a lease agreement, the employee proceeded with her move to San Antonio. On July 30, 2024, the employee received an email from the employer indicating that she had been terminated due to "KDS guidelines." The employee responded to this email, stating that she was trying to obtain a transfer. The employer replied, stating that she was terminated. The employee did not know what the "KDS guidelines" in question were.

The initial issue before the commission is whether the employee quit or was discharged. If the employee quit, a secondary issue is whether the quitting was for any reason that would permit the immediate payment of unemployment benefits. If the employer discharged the employee, a secondary issue is whether the discharge was for misconduct or substantial fault connected with the employee's work.

In this case, the employer discharged the employee from her employment. The employee made numerous attempts to remain employed by contacting the employer to request a transfer to her new location in San Antonio, months before she actually

moved. The employer, despite promising her a new position in San Antonio and assuring her that her transfer request was being processed, did not respond to several of the employee's attempts at contacting it to determine the status of her transfer request. The employee's employment ultimately ended after the employer sent the employee an email informing her that she had been terminated. The commission, therefore, finds that in week 28 of 2024, the employee was discharged from her employment with the employer.

Having concluded that the employer discharged the employee, the commission next considers whether the employer discharged the employee for misconduct or substantial fault connected with the employee's work that would disqualify the employee from receiving unemployment insurance benefits. The employer bears the burden of establishing that the employee was discharged for disqualifying misconduct or substantial fault. *Operton v. LIRC*, 2017 WI 46, ¶38, 375 Wis. 2d 1, 894 N.W.2d 426. An employer meets that burden by introducing competent and persuasive evidence at the hearing of the employee's actions that led to discharge through witnesses who can offer firsthand testimony as to those actions. *Dommissie v. Newer Beginnings LLC*, UI Dec. Hearing No. 11404681AP (LIRC May 23, 2012).

In this case, the employer failed to meet its burden to prove that the employee was discharged for conduct amounting to either misconduct or substantial fault. The employer did not appear at the hearing to offer any firsthand testimony as to what actions on the part of the employee led to its decision to discharge her from her employment. Based solely upon the employee's testimony, the employee was discharged for violating "KDS guidelines." The employee did not know which guidelines the employer alleged she had violated, and the employer did not offer any evidence to suggest that the employee's conduct violated any of its guidelines.

The commission, therefore, finds that in week 28 of 2024, the employee was discharged, but not for misconduct or substantial fault, within the meaning of Wis. Stat. § 108.04(5)-(5g).

Memorandum Opinion

Prior to issuing its decision, the commission consulted with the ALJ who held the hearing to obtain his impressions as to the credibility of the witnesses, based on their demeanor. However, the ALJ had no demeanor impressions to impart.

The commission's decision reversing the ALJ is not based upon a differing assessment of witness credibility, but rather a differing interpretation of the relevant law as applied to the facts of this case. Specifically, the commission disagrees with the ALJ's conclusion that the employee's conduct constitutes a quit for unemployment insurance purposes. The seminal case defining whether an employee has voluntarily terminated his or her employment, *Dentici v. Indus. Comm'n*, 264 Wis. 181, 186, 58 N.W.2d 717 (1953), provides that:

[w]hen an employee shows that he intends to leave his employment and indicates such intention by word or manner of action, or by

conduct inconsistent with the continuation of the employee-employer relationship, it must be held . . . that the employee intended and did leave his employment voluntarily. . . .

Dentici makes clear that, in order to find that the employee quit his or her position, there must be sufficient evidence that (a) the employee intended to leave his or her employment, and (b) that the employee indicated such intention by either words, action, or conduct inconsistent with the continuation of the employment relationship. In this case, the employee's decision to move to San Antonio did not demonstrate the requisite intent to leave her employment necessary to support a finding that she did, in fact, voluntarily terminate her employment with the employer. Rather, the commission finds that the employee's un rebutted testimony that she was promised a new position in San Antonio, combined with her repeated attempts to contact the employer in order to clarify her transfer status, demonstrate that she was diligent in ensuring that she would remain employed.